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Introduction

Public International Economic Law: The Academy Must Invest

Robert E. Hudec*

In the almost five decades since the end of World War II, the world has witnessed a vast expansion in the size and scope of the international marketplace. By 1989, international trade in goods and services had grown to account for ten percent of the U.S. Gross Domestic Product, and closer to twenty percent for most other developed countries. Other sectors of international activity such as banking and finance have become even more closely integrated. The growth of what looks like a single world market has led an increasing number of businesses to organize their operations on a global basis. Few businesses today are immune from the influence of international markets.

One of the many aphorisms about law is that law develops to serve the needs of the marketplace. The postwar growth of the international marketplace is certainly a case in point. Increasing levels of international business activity have led merchants to call for developments in private law that will provide better and more secure forms of doing business internationally. Merchants also call for developments of public law, both national and international, that will give greater stability and predictability to the actions of governments in this area.

The private law response to these marketplace demands has been encouraging so far. One can point to specific international developments, such as the major expansion of international commercial arbitration after the New York Convention of 1958, or the 1980 Vienna Convention on Contracts for the International Sale of Goods. One can also point to the multitude of developments within national legal systems that have served to accommodate these new business activities. While much more

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remains to be done, the processes and materials for doing so appear to be at hand. The critical fact is that private law developments can build directly upon the well-functioning body of national commercial laws already in place.

The public law problems are more challenging. Government policy makers generally understand the need for a stable and predictable business environment. They also understand that the best way to achieve that kind of environment in the international marketplace is through international negotiation, resulting in binding commitments regarding government behavior. But unlike the private law sector, efforts to create a public international law in the area of economic affairs have only a very weak base on which to build.

On the normative side, the pre-war experience with international economic affairs had left governments with only the most rudimentary rules about what governments should and should not do, and most of those rules related to a world in which contacts were far more limited than they are today. To be sure, quite a lot of new normative development has gone on since the war in organizations like GATT and OECD, but even so the substantive norms of the 1990s are still far from complete, and far from completely coherent.

On the enforcement side, the situation has been equally tenuous. Governments have not yet been willing to surrender any meaningful degree of autonomy to international legal regimes in economic affairs. GATT's dispute settlement machinery has been celebrated as a major victory along the road to enforceable norms — and rightly so. But on the tree of legal evolution GATT's adjudication machinery is still down at the level studied by legal anthropologists, right alongside dispute resolution ceremonies practiced among primitive societies.

As a consequence, we have today a booming international economy, expanding rapidly in all directions, served reasonably well by a healthy and growing private law network, but served rather poorly by a limited and primitive public international law of economic affairs. The situation on the public law side is not quite as grim as it sounds, because governments are generally able to appreciate their mutual self-interest even without the aid of law and, so guided, can usually manage to avoid the most damaging errors by muddle-through diplomacy (an art not to be undervalued). But the more the international economy becomes integrated, the more friction will be created by unregulated pol-

icy differences and disturbances. In the long run, the public law side simply must catch up with the market.

The decade of the 90s will most likely produce a temporary downturn in the quality of the public law that presently exists. National governments currently seem locked into positions that will cause the current state of commercial belligerence to continue and probably to escalate for a while. We can expect to see (1) the United States Congress continuing to wield power over foreign economic affairs without accepting the responsibility that goes with it, (2) Europe looking inward to its own development, freed from its Cold War dependence on the United States, and (3) Japan, also freed from Cold War dependence, continuing to follow its present policies and practices. As a consequence, international legal institutions such as GATT, although they may continue to grow in membership and in responsibilities, are likely to continue suffering large and small legal defeats for a while as governments continue resorting to economic force rather than accepting legal resolution of conflicts.

When betting on the future, though, it is a good idea to bet where the money is. An enormous amount of private resources, from all major countries, has already been invested in reliance on the continued growth and openness of the international economy. And a significant share of the money seeking new investment opportunities will be targeted there as well. The safest bet is that money will talk, and that governments will ultimately be restrained before doing too much damage.

If that prediction is correct, two conclusions can be drawn. First, the development of public international economic law must become a major priority for the present generation of legal scholars, in the United States and elsewhere, and it must remain a major priority for the generation that follows. A great deal of work needs to be done. A major investment in that scholarly enterprise — whether in curriculum, in research, or in journals like this one — is clearly timely.

Second, we must appreciate that the development of public international economic law is not something that can be accomplished by the technical skills of legal scholars alone. As noted above, the state of normative and institutional development in this area is very primitive, at best. As the growing controversy over trade and environmental policy attests, the present normative structure is having a hard time even keeping up with the changing world of science and technology, and with the continual evolution of national social policies. Institutional inadequa-

cies are likewise evident. Consequently, one cannot separate thinking about international economic law from thinking about the larger issues of international economic policy and international institutions that must be resolved first. I commend the *Minnesota Journal of Global Trade* for the breadth of its mission statement in this regard, and I congratulate the editors for a first table of contents that carries out that promise with such distinction.